

**A Awtar Singh a/l Puran Singh (practising as an advocate and
solicitor under the name and style of AS Saini & Assoc) v Etiqa
Insurance Bhd**

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL
NO A-02(NCvC)(W)-55-01 OF 2018
HAMID SULTAN, HANIPAH FARIKULLAH AND
KAMALUDIN SAID JJCA
C 26 MARCH 2019

*Insurance — Professional liability policy — Liability of insurers — Lawyer sued
for negligence had purchased professional indemnity insurance cover — Solicitors
appointed by insurers to defend negligence suit struck out same without hearing
— Lawyer thereafter personally took over conduct of defence, discharged solicitors
and engaged in series of actions that allowed plaintiffs in negligence suit to reinstate
their suit and obtain judgment for damages against him without any resistance
— Whether High Court rightly dismissed lawyer's action against respondent for
indemnity in respect of judgment sum that lawyer ordered to pay plaintiffs in
negligence suit — Whether lawyer's claim fraudulent entitling insurers to
repudiate liability — Whether actions of lawyer in facilitating judgment to be
entered against him for negligence constituted acts of 'misconduct' under insurance
policy amounting to fundamental breach thereof*

F The appellant was sued for professional negligence for causing a suit in which
he had acted for the plaintiffs ('the plaintiffs') to be struck out for want of
prosecution. On being informed by the appellant of the negligence suit, the
respondent, from whom the appellant had purchased compulsory professional
indemnity insurance ('the policy'), appointed solicitors ('Messrs R&Y') to
G defend the suit. Messrs R&Y successfully applied to court to strike out the
negligence suit for want of prosecution. However, while an application by the
plaintiffs to reinstate the struck-out suit was pending, the appellant, without
the respondent's permission, effectively discharged Messrs R&Y from acting
H for him by filing in court a notice of intention to act in person. The appellant
also informed the court that he had no objections to the negligence suit being
reinstated. These unusual acts by the appellant caused the respondent to
immediately notify the appellant that his actions constituted a serious
misconduct amounting to a breach of the terms and conditions of the policy
I entitling the respondent to repudiate liability. Since there was no objection
from the appellant, the court reinstated the negligence suit, found the appellant
negligent (on the appellant's admission in his statement of defence that he was
contributorily negligent) and ordered him to pay the plaintiffs damages as
assessed by the deputy registrar. The appellant raised no objections during the

hearing for assessment of damages. The appellant later sued the respondent for indemnity under the policy in respect of RM353,061.83 which the court ordered the appellant to pay the plaintiffs. The High Court dismissed the appellant's indemnity action on finding that he had, inter alia, acted in a way that seriously prejudiced the respondent's interests and breached the terms and conditions of the policy entitling the respondent to refuse liability under the policy. The court found that the appellant's claim was fraudulent based on his: (a) filing of the notice of intention to act in person; (b) failure to object to the application to reinstate the negligence suit; (c) admission during the trial that he had prepared the court documents for the plaintiffs (who were his brothers) in the negligence suit; (d) buying top-up insurance of RM10m from the respondent six months before the negligence suit was filed in court; (e) admission of liability in the negligence suit; and (vi) not raising any objections during the hearing for assessment of damages.

Held, dismissing the appeal:

- (1) Based on the evidence, the respondent had successfully proven that it had the right to decline liability under the policy and to not indemnify any false and/or fraudulent claim under cl 5.10 read together with cl 7.2 of the policy (see para 60).
- (2) It was clear from the evidence that the appellant had materially prejudiced the respondent's conduct of the defence in the negligence suit when he: (a) informed the court and Messrs R&Y that he had no intention of objecting to the application for reinstatement of the negligence suit; (b) informed Messrs R&Y that he intended to admit negligence in the suit; and (c) took over the conduct of the defence by filing the notice of intention to act in person the respondent was therefore responsible for any loss he had suffered (see paras 55–56).
- (3) The appellant's actions fell under the definition of 'misconduct' under cl 3.4 of the policy which defined misconduct as any act or omission manifesting dishonesty or substantial lack of good faith. Clause 7.2 read together with cll 3.4 and 5.10 of the policy entitled the respondent to decline liability to indemnify a fraudulent claim. Clause 5.10 provided that if an insured preferred a claim knowing it to be false or fraudulent as regards amount or otherwise, the policy was voidable and the insured shall forfeit the benefit due to him under the policy (see paras 45 & 47).
- (4) The appellant failed to establish on balance of probabilities that there was no misconduct on his part amounting to a breach or non-compliance with the terms of the policy as stated in proviso 1 of cl 7.2 of the policy. In fact, in his written submissions, the appellant clearly admitted committing a breach or non-compliance with the terms of the policy. Also, by not disputing the respondent's notice that he had committed a

- A breach of the policy, the appellant was deemed to have acknowledged the grounds on which the notice was given (see paras 42 & 57–59).

[Bahasa Malaysia summary]

- B Perayu telah disaman untuk kecuai profesional kerana menyebabkan guaman yang mana dia bertindak bagi pihak plaintif-plaintif ('plaintif tersebut') dibatalkan sebab ketiadaan pendakwaan. Setelah diberitahu oleh perayu tentang guaman kecuai itu, responden, dari mana perayu telah memberli insurans perlindungan profesional wajib ('polisi tersebut'), telah melantik peguamcara ('Tetuan R&Y') untuk membela guaman tersebut.
- C Tetuan R&Y telah berjaya memohon kepada mahkamah untuk membatalkan guaman kecuai kerana ketiadaan pendakwaan. Walau bagaimanapun, semasa suatu permohonan oleh plaintif tersebut untuk menghidupkan semula guaman yang dibatalkan itu masih belum selesai, perayu, tanpa kebenaran responden, dengan berkesan melepaskan Tetuan R&Y daripada bertindak untuknya dengan memfailkan di mahkamah notis niat untuk bertindak sendiri. Perayu juga memberitahu mahkamah bahawa dia tiada bantahan kepada guaman kecuai tersebut dihidupkan semula. Tindakan luar biasa tersebut oleh perayu menyebabkan responden dengan segera memberitahu
- E perayu bahawa tindakannya merupakan salah laku serius yang membentuk suatu pelanggaran terma dan syarat polisi yang memberi hak untuk responden menagguhkan liabiliti. Oleh kerana tiada bantahan daripada perayu, mahkamah telah menghidupkan semula guaman kecuai tersebut, mendapati perayu telah cuai (berdasarkan pengakuan perayu dalam kenyataan pembelaannya bahawa dia adalah penyumbang kecuai) dan memerintahkannya untuk membayar plaintif tersebut ganti rugi sepertimana ditaksir oleh timbalan pendaftar. Perayu tidak menimbulkan apa-apa bantahan sepanjang perbicaraan untuk taksiran ganti rugi. Perayu kemudian telah menyaman responden untuk indemnity di bawah polisi tersebut
- G berkaitan RM353,061.83 yang mahkamah memerintahkan perayu untuk membayar kepada plaintif tersebut. Mahkamah Tinggi telah menolak tindakan indemnity perayu setelah mendapati dia telah, antara lain, bertindak dalam cara yang memprejudiskan secara serius kepentingan responden dan melanggar terma dan syarat polisi tersebut yang memberi hak kepada
- H responden untuk menolak liabiliti di bawah polisi tersebut. Mahkamah mendapati bahawa tuntutan perayu berunsur fraud berdasarkan: (a) pemfailan notis niatnya untuk bertindak secara sendiri; (b) kegagalannya untuk membantah permohonan menghidupkan semula guaman kecuai tersebut; (c) pengakuan semasa perbicaraan bahawa dia telah menyediakan dokumen mahkamah untuk plaintif tersebut (yang merupakan adik-beradik lelaki) dalam guaman kecuai tersebut; (d) membeli tambahan insurans RM10 juta daripada responden enam bulan sebelum guaman kecuai tersebut difailkan di mahkamah; (e) pengakuan liabiliti dalam guaman kecuai; dan (f) tidak menimbulkan bantahan semasa perbicaraan taksiran ganti rugi.
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Diputuskan, menolak rayuan:

- (1) Berdasarkan keterangan, responden telah berjaya membuktikan bahawa ia mempunyai hak untuk menolak liabiliti di bawah polisi tersebut dan untuk tidak mengganti rugi apa-apa tuntutan fraud dan/atau berunsur fraud di bawah fasal 5.10 dibaca bersama fasal 7.2 polisi tersebut (lihat perenggan 60). A
- (2) Ia jelas dari keterangan bahawa perayu secara material telah memprejudiskan perbuatan pembelaan responden dalam guaman kecuaiannya itu apabila dia: (a) memaklumkan kepada mahkamah dan Tetuan R&Y bahawa dia tidak berhasrat untuk membantah permohonan untuk menghidupkan semula saman kecuaiannya tersebut; (b) memaklumkan Tetuan R&Y bahawa dia berhasrat mengakui kecuaiannya dalam guaman tersebut; dan (c) mengambil alih perbuatan pembelaan dengan memfailkan notis niat bertindak secara sendiri. Oleh itu, responden bertanggungjawab terhadap apa-apa kerugian yang telah dialaminya (lihat perenggan 55–56). B
- (3) Tindakan perayu terjatuh di bawah takrif ‘salah laku’ di bawah fasal 3.4 polisi tersebut yang mentaksirkan salah laku sebagai apa-apa perbuatan atau peninggalan yang menunjukkan ketidakjujuran atau kekurangan kepercayaan yang substantial. Fasal 7.2 dibaca bersama dengan fasal 3.4 dan fasal 5.10 polisi tersebut memberi hak kepada responden untuk menolak liabiliti bagi menanggung rugi tuntutan fraud. Fasal 5.10 memperuntukkan bahawa jika seseorang yang diinsuranskan mengutamakan suatu tuntutan dengan mengetahui bahawa ia adalah palsu atau berunsur fraud berkenaan dengan amaun atau selainnya, polisi tersebut boleh dibatalkan dan yang diinsuranskan akan kehilangan manfaat kepadanya di bawah polisi tersebut (lihat perenggan 45 & 47). C
- (4) Perayu telah gagal membuktikan atas imbalan kebarangkalian bahawa tiada salah laku di pihaknya yang melanggar atau tidak mematuhi terma-terma polisi tersebut sebagaimana dinyatakan dalam proviso 1 fasal 7.2 polisi tersebut. Malah, dalam penghujahan bertulisnya, perayu dengan jelas mengakui telah melakukan pelanggaran atau ketidakpatuhan terhadap terma polisi tersebut. Selain itu, dengan tidak mempertikaikan notis responden bahawa dia telah melakukan pelanggaran polisi tersebut, perayu dianggap mengakui alasan yang mana notis tersebut telah diberikan (lihat perenggan 42 & 57–59). D

Cases referred to

- AXA Affin General Insurance Bhd v ALW Car Workshop Sdn Bhd* [2017] 2 MLJ 101, CA (refd) E
- HLB Kidsons (a firm) v Lloyd’s Underwriters subscribing to Lloyd’s policy No 621/PK1D00101* [2008] All ER (D) 40 (Nov), CA (refd) F

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- A *Hong Leong Bank Bhd v Asakura Industry Sdn Bhd & Ors* [2011] 9 MLJ 723, HC (refd)
Modern Universal Sdn Bhd v MSIG Insurance (M) Bhd (formerly known as Hong Leong Assurance Bhd) [2014] 11 MLJ 186, HC (refd)
B *Nsubuga v Commercial Union Assurance Co Plc* [1998] Lexis Citation 3243; [1998] 2 QB 682, QBD (refd)
Quinn Direct Insurance Ltd v Law Society of England and Wales [2010] EWCA Civ 805, CA (refd)
C *Shan & Gooi (suing as a firm of advocates & solicitors) v Capital Insurance Berhad (10393-D), Willis (Malaysia Sdn Bhd, Malaysia National Insurance Berhad (9557-T), Antah Sedgwick Insurance Brokers Sdn Bhd* [2011] MLJU 440, HC (refd)
Tan Leng Choo & Ors v Law Teck Huat [2009] 1 MLJ 820, CA (refd)

D **Legislation referred to**

Contracts Act 1950 s 17
Legal Profession Act 1976 s 78A

- E **Appeal from:** Civil Suit No AB 22NCvC-04-02 of 2017 (High Court, Taiping)

Awtar Singh representing himself.
Felicia Sh Ho (Jane Pragasam and T Arasu with her) (Ho-Noecker & Pragasam) for the respondent.

- F **Kamaludin Said JCA:**

INTRODUCTION

- G [1] The appellant appealed against the decision by the High Court in Taiping which has dismissed the appellant's claim for specific performance of the mandatory insurance policy for the respondent to indemnify the appellant in respect of the judgment obtained against the appellant in the sum of RM353,061.83. The High Court had also dismissed the appellant's claim for
H general damages against the respondent.

- I [2] We heard the appeal and the submissions from the appellant acting in person and counsel for the respondent. We have also read the written submissions filed herein including further specific submission filed by the appellant on our direction. We later adjourned the appeal to a date to be fixed for our decision.

FACTUAL BACKGROUND

[3] Pursuant to s 78A of the Legal Profession Act 1976, all advocates and solicitors in West Malaysia, including the appellant, are insured under a Professional Indemnity Insurance Scheme ('PII Scheme') with the same mandatory limit and with option to top up.

[4] The appellant was insured with the respondent for the period between 1 July 1997–30 June 1998 with mandatory limit in the sum of RM50,000 via Certificate No M97/01811 ('1997 policy') and top-up insurance in the sum of RM1.25m. For Certificate No 2001/MY/0026 ('2001 policy'), the appellant was insured with the respondent for the period between 1 January–31 December 2001 with mandatory limit in the sum, of RM250,000 and top-up insurance in the sum, of RM10m.

[5] At the High Court, the appellant's claim against the respondent for specific performance of the mandatory insurance contract/top up policy for the respondent to indemnify the appellant in respect of the judgment obtained by Nirwant Singh a/l Puran Singh against him (together with costs) in the sum of RM353,061.83 and general damages.

[6] The salient facts of the case related to the appellant's claim can be summarised as follows:

Dates	Events/Proceeding
21 August 1985	Ipoh High Court, Civil Suit No 1477 of 1985 ('GS 1985') filed by the appellant, Nirwant Singh, Harjit Singh, Aya Singh, Namindar Kaur and Milkitt Kaur against Manjit Singh and Ban Beng Realty.
17 March 1986	Civil Suit No 22–26 of 86 ('GS 1986') filed at the Ipoh High Court by the appellant, Nirwant Singh and Harjit Singh ('the plaintiffs in GS 1986') against Moganasundram a/l Govindasamy ('Moganasundram'). (AS Saini & Assoc is the solicitors on record who acted for the plaintiffs in GS 1986 from 10 December 1994).
22 October 1994	The court dismissed GS 1985 on the ground that there has been inordinate delay and failure to take out summons for directions.
27 July 1985	The court dismissed GS 1986 on the ground of want of prosecution.
1 July 1997–30 June 1998	The appellant was insured under the 1997 policy

A	31 May 1997	The appellant informed the insurance broker Antah Sedgwick Insurance Brokers Sdn Bhd of three potential claims in the Proposal Form ie GS 1985, GS 1986 and a claim filed vide Johor Bahru Sessions Court Suit No 53–164 of 1996.
	10 September 1998	The Civil Suit No 22–56 of 98 (‘GS 1998’) was filed at the Taiping High Court by the appellant, Nirwant Singh, Harjit Singh, Aya Singh, Namindar Kaur, Milkitt Kaur and Manmohan Singh against Bachan & Kartar, RK Nathan & Co, CK Leong & Co, Manikam Avadiar & Co & Mohd Ismail B Ali Johor in respect of the alleged negligence for the conduct of GS 1986.
B	20 May 1999	The Court of Appeal dismissed the application by the plaintiffs in GS 1986 to reinstate GS 1986.
	1 January 2001–31 December 2001	The appellant was insured under 2001 policy.
C	January/February 2001	The appellant purchased top up insurance for 2001 policy for a sum of RM10m.
	23 July 2001	Civil Suit No 22–25 of 2001 (‘GS 2001’) was filed at the Ipoh High Court by Nirwant Singh, Harjit Singh, Aya Singh, Namindar Kaur, Milkitt Kaur and Manmohan Singh against RK Nathan & Co, Mohd Ismail B Ali Johor & AS Saini & Assoc in respect of the alleged negligence for the conduct of GS 1986.
D	27 February 2002	The appellant filed defence for GS 2001
	13 January 2002	The respondent appointed Kris Edward & Derek to act for the appellant in GS 2001.
E	5 November 2004	The appellant filed third party proceedings against the respondent.
	9 September 2005	The court ordered that the appellant’s defence for GS 2001 is struck off and judgment entered in favour of the plaintiffs in GS 2001 against the appellant herein. (The court ordered the appellant to pay the sum RM942,350 together with compounded interest of 10% to the plaintiffs in GS 2001).
F	12 May 2009	The Court of Appeal ordered that the High Court’s order dated 9 September 2005 be set aside and that GS 2001 is reverted to Taiping High Court for trial before another judge.
	3 June 2009	The respondent appointed Messrs Ranjit Singh & Yeoh to act for the appellant in GS 2001.

10 September 2012	Messrs Ranjit Singh & Yeoh filed an application for striking out of the GS 2001 on the ground of want of prosecution.	A
26 November 2012	The court ordered GS 2001 to be struck off on the ground of want of prosecution.	B
30 December 2013	The plaintiffs in GS 2001 filed an application to set aside the order dated 26 November 2012.	
21 January 2014	Messrs Ranjit Singh & Yeoh filed the third defendant first affidavit (to oppose the plaintiffs' application to set aside the order (encl 179)) for the appellant.	C
17 February 2014	The appellant filed a notice of intention to act in person to replace Messrs Ranjit Singh & Yeoh.	D
17 March 2014	The appellant wrote a letter to court enclosing the notice of intention to act in person and further confirmed that the appellant had no objection to the application by the plaintiffs in GS 1986 to reinstate GS 1986.	
28 March 2014	Messrs Ranjit Singh & Yeoh gave notice to the appellant that the respondent was reconsidering insurance coverage for the plaintiffs GS 2001 claim against the appellant.	E
8 April 2014	The respondent informed the plaintiffs to their decision to decline the appellant's claim and shall not be liable to indemnify the appellant for any and/or all liabilities arising from GS 2001.	F
15 May 2014	The Court allowed the application by the plaintiff's in GS 2001 to set aside the order dated 26 November 2012 and ordered that GS 2001 to be reinstated.	G
15 May 2014	Upon the application by the plaintiffs in GS 2001, the court ordered that the GS 2001 be consolidated with GS 1998.	
10 September 2014	The court found that the appellant was negligent and made an order that the appellant pays general and special damages to the plaintiffs in GS 2001 and damages to be assessed by the registrar. (The court gave liberty to the appellant to file a fresh writ action against the respondent).	H
6 February 2015	Damages assessed before the deputy registrar.	I
3 March 2017	The appellant filed an action against the respondent at High Court, ('the 2017 Suit') for indemnity.	
11 December 2017	The High Court judge dismissed the appellant's claim with cost of RM30,000 to be paid to the respondent.	

A	<table><tr><td data-bbox="422 434 694 481">5 January 2018</td><td data-bbox="694 434 1292 481">The appellant filed notice of appeal.</td></tr></table>	5 January 2018	The appellant filed notice of appeal.
5 January 2018	The appellant filed notice of appeal.		

DECISION OF THE HIGH COURT

B [7] The appellant's firm was sued in GS 2001 related to his handling of GS 1986. The appellant claimed against the respondent to indemnify all the judgment sum ordered by the High Court under 2001 policy covers liability to the limit of RM10m. The respondent alleged that the policy which is applicable is 1997 policy. The appellant did not plead that the claim is based on 1997 policy and 2001 policy is not applicable hence, the appellant's claim is baseless. The respondent's position is that the appellant had no cause of action against the respondent and as alternative, the respondent has the right to decline indemnity based on the misconduct of the appellant.

D [8] The learned judicial commissioner ('JC') made a finding that the first notice given by the appellant to the respondent related to possible third party claim against him is material. The policy which is applicable is the policy at the time notice was given. In this case, the respondent was notified by the said notice under 1997 policy therefore, the said policy is applicable and not 2001 policy. The learned JC found that the appellant had failed to prove his claim against the respondent and his claim was dismissed.

F [9] The finding of facts of the learned JC was based on the appellant's pleaded case and the appellant's admission that in the proposal Form for the purchase of 1997 policy submitted to the broker Antah Sedgwick Sdn Bhd, he had informed the broker of potential claim from third party against him including his handling of GS 2001 as solicitor. The learned JC referred to both policies 1997 policy and 2001 policy and found both policies contain cl 5.1 which requires notice to be given to the respondent as insurer on any possible claim to be made. The learned JC also referred to cl 4.1 which states clearly that the insurer shall indemnify the insured against any claim first made during the period of insurance in respect of any civil liability incurred in the course of conduct of the profession by practice. The learned JC found that the appellant had given his first notice to the respondent for possible claim made against him in respect of his handling GS 1986 as solicitor when he purchased 1997 policy, therefore, it is clear that 1997 policy is applicable and not 2001 policy.

I [10] The learned JC had also considered the alternative argument whether the respondent has the right to decline indemnity on the ground of misconduct by the appellant. The respondent had denied any liability to indemnify the appellant related to GS 2001. The learned JC referred to cl 7.2 of the insurance policy which provides exception for non-payment of the premium to the insureds to avoid any claim on the grounds of breach or non-compliance with the terms and conditions of insurance, provided the person seeking indemnity

must establish on the balance of probability that the breach or non-compliance was not attributable to misconduct on his part.

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[11] The learned JC referred to the respondent's defence. In the defence, the respondent alleged that the appellant had filed and served the notice of intention to act in person dated 17 February 2014 to Messrs Ranjit Singh & Yeoh on 21 March 2014, without the permission from the respondent. The filing of the said notice has breached the terms and conditions of the insurance certificate for 1997 policy. The respondent thus has the right to decline liability to indemnify the appellant on any loss suffered by him. The appellant was informed on the respondent's decision in its letter dated 8 April 2014.

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[12] The learned JC considered the evidence given during trial and found the act of filing the said notice to replace Messrs Ranjit Singh & Yeoh appointed by the respondent to represent the appellant in GS 2001 had breached the terms and conditions of the contract of insurance. The learned JC agreed with the respondent that it was a misconduct within the definition of the policy. The act had prejudiced the interest of the respondent in defending the suit in whatsoever manner deemed appropriate to safeguard the interest of the appellant and the respondent. The court also found that the appellant's action in supporting Nirwan Singh's application to reinstate GS 2001 was a serious misconduct which entitled the respondent to decline indemnity under 1997 policy.

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[13] The learned JC found that the appellant had committed fraud against the respondent by supporting the plaintiffs in GS 2001 to reinstate the said suit which had been struck off by the court on application by the respondent for wants of prosecution. The learned JC was of the opinion that the appellant as a party being sued in GS 2001 should feel relieved that the action against him was struck off by the court but instead took an action which was contrary to his interest as defendant and the respondent as his insurer to support the plaintiffs' application to reinstate the said suit.

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[14] The learned JC was of the opinion that the appellant's indifference attitude shown to GS 2001 was a pre-planned action to allow his own brother to get an easy case against him as the defendant in GS 2001 of which the appellant was ready to admit contributory negligence on his part in the claim brought by the plaintiff in the said case. During cross-examination, the appellant admitted that the judgment entered for the plaintiff in the said case was on the ground that there was no defence filed on his part as defendant. The appellant's action to defraud the respondent was also proven when he did not resist or raise any objection during the hearing of assessment of damages proceeding.

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- A [15] The learned JC had also considered the appellant's evidence that he filed the said notice in order to remove the lawyer appointed by the respondent because the said lawyer disagreed with his instruction not to object to the Nirwant Singh's application to GS 2001. The learned JC found that there was a conspiracy to defraud the respondent by allowing the judgment to be entered against appellant as defendant in the said GS 2001 with the intention to obtain indemnity payment from the respondent under 1997 policy. The appellant admitted that he prepared the court's documents on behalf of the plaintiff in GS 2001 and the appellant top-up his policy to RM10m before GS 2001 was filed in court. Nirwant Singh had also used the appellant's address as his address of service when his actual address is in Nilai, Negeri Sembilan.

GROUNDS OF APPEAL AND SUBMISSION

- D [16] We have read through the appellant's grounds of appeal and his submission. In the appellant's submission his main complaint is that the learned JC had failed to give attention to his letter dated 19 March 2001. This letter was written by the appellant to the respondent but the respondent did not reply to the said letter or terminated the top-up 2001 policy and/or returned the premium payment of RM7,689 to the appellant. He submitted that the letter enquires about the effect of cl 5.1 of the certificate of insurance 2001 policy, ie whether cl 5.1 of the certificate of insurance was an exclusion clause. It was submitted that the law applicable involves 'exclusion' clauses. Therefore, the issue is whether, the 'no-reply' of the respondent has terminated the 2001 top-up policy or created a new contract and not subject to any exclusion clauses being relied on by the respondent to exclude its liability.

- G [17] The appellant submitted that the respondent did not inform the appellant whether the exclusion terms were part of the terms in the top-up of the 2001 policy at the time the contract was made and premium payment of RM7,689 was received by the respondent on or about 1 March 2001. It was submitted that the top-up of the 2001 policy is not subject to any exclusion clauses in the certificate of insurance in particular cll 5.1, 5.5, 5.6 or 5.10.

- H [18] As an alternative, if the breach of cll 5.5, 5.6, and/or 5.10 of the certificate of insurance was caused by the filing of notice to act in person by the appellant on 17 March 2014, and the breach was relied as ground by the respondent to avoid liability under the contract, it is only applicable to the mandatory policy but not to the appellant's top-up 2001 policy.

I OUR DECISION

- [19] Having examined the records of appeal, the appellant did not plead any facts related to the said letter dated 19 March 2001 in the amended statement

of claim dated 3 March 2017. The issue regarding the said letter only surfaced during the appellant re-examination stage and was objected by the respondent on ground that the issue raised was never pleaded in the statement of claim (see notes of evidence at p 1506 of the additional record of appeal III). The learned JC acknowledged that the issue raised by the appellant was not part of the question asked during cross-examination on the appellant and was a new issue (see notes of evidence at p 1507 of the additional record of appeal III). The issue was also not raised by the appellant during his examination in chief in his witness statement marked as 'Ikatan 'F' at pp 77–85 of the record of appeal Part B, Vol 2A.

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[20] Having read the learned JC's grounds of judgment, although we agreed that the said letter was not referred to and dealt with in the judgment, the decision was not erroneous because there is no compelling reason for the learned JC to do so since the issue raised pertaining to the said letter was a new issue and not raised during cross-examination. Most importantly, it was not the appellant's pleaded case and not even produced by the appellant before the court during the trial.

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[21] It is trite law that parties are bound by their own pleadings and that a party stands or falls by the four corners of his pleadings. The court shall only decide on issues which were pleaded and not otherwise (see the Court of Appeal case of *Tan Leng Choo & Ors v Law Teck Huat* [2009] 1 MLJ 820). It was also held in *Hong Leong Bank Bhd v Asakura Industry Sdn Bhd & Ors* [2011] 9 MLJ 723 that the rule that parties are bound by their pleadings is both elementary and mandatory in our system of civil litigation. Aside from allowing parties to know exactly what are the matters in dispute so that they know what facts they gave to marshal to prove at trial and thus avoid any element of surprise in civil litigation, the rule also places on record the precise issues presented to the court for adjudication so that the trial can proceed in an orderly and organised manner and avoid the situation where a matter not pleaded may be relitigated in another forum by the parties.

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[22] The record of appeal Part C, Vol 2E, at pp 807–813 is the appellant's duly completed proposal form for insurance dated 31 May 1997. The appellant had stated in the said form of three possible claims which may derived from Guaman Sivil ('GS') 1985, GS 1986 and GS 1996. The cover letter for submission of the duly completed proposal from Messrs AS Saini & Assoc to Antah Sedgwick Insurance Brokers Sdn Bhd dated 5 June 1997 at p 806 stated that the duly completed proposal form is for the renewal for the 1997/98 policy year. At pp 815–816 are the Certificate No M97/01811 ('1997 policy'), for the period between 1 July 1997–30 June 1998 with mandatory limit in the sum of RM250,000 with insurance premium of RM594.27 inclusive of service tax. The top-up insurance for 1997 policy is in the sum of RM1.25m with the

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A insurance premium of RM915.06 inclusive of service tax. It is also stated that the insurance is subject to the terms, exception and conditions of the Master Policy DPI-439000246-04.

B [23] The record of appeal at pp 817-819 and 825 are the Certificate No 2001/MY/0026 ('2001 policy'), for the period between 1 January-31 December 2001 with mandatory limit in the sum of RM250,000 with insurance premium of RM982. The top-up insurance is in the sum of RM10m with the insurance premium stated as RM7,689 inclusive of service tax. It is also stated that the insurance is subject to the terms, exception and conditions of the Master Policy DPI-43900246457-C5.

D [24] The appellant's pleaded case in the amended statement of claim at pp 22-31 of the record of appeal Part A, Vol 1, para 11 stated that the appellant bought mandatory insurance and top-up insurance for his loss to be indemnified by the respondent. At para 15, the appellant pleaded that from the period of 1 March-31 December 2001, the appellant bought the top-up insurance premium RM7,6789 for insurance coverage of RM10m. At para 16, the appellant pleaded that the purpose and direction to purchase the top-up policy was for joint and/or separate insurance coverage for other legal firms which had acted for the representative in the civil suits. At para 45, it was stated that within the period of coverage of mandatory and top up insurance, the appellant had served the Writ SG 2001, 'the claim' received from Nirwant Singh and five other plaintiffs to the respondent. Finally, the appellant stated in his prayer at para 59 for the court to order specific performance against the respondent under the mandatory and/or top-up contract of insurance to indemnify the judgment sum of RM353,061.83 and costs of RM20,000 entered against him by Nirwant Singh.

G [25] It was not disputed that there were two insurance policies bought by the appellant to protect his professional practice. The learned JC had made a finding of fact that the policy which is applicable is the policy at the time notice was given. His decision in our opinion is correct since the respondent was informed of potential claim under 1997 policy therefore, the said policy is applicable and not 2001 policy. In fact, by letter dated 11 October 2002 (p 1292, additional record of appeal II), the appellant was informed that his potential claim was made at the time of the notification in the year 1996 and a claim only materialised in the year 2001 and by virtue of cl 5.1.3, the policy year that should respond to the claim is the policy for the year in which the notification was given which is the year 1996.

I [26] Clause 5.1.3 says as follows:

Any claim arising from any matter, event or circumstances of which Notice has been given in accordance with General Condition 5.1.1 or 5.1.2 shall be regarded as a

claim first made during the Period of Insurance in which such Notice was given.

A

[27] SD1 in her witness statement had clearly explained that the 1997 policy would respond to the appellant's claim:

A11: The 1997/1998 and 2001/2002 Policy are both 'claims made' policies. A 'claims made' policy means a policy providing coverage that is triggered when a claim is first made against the Insured during the policy period, regardless if when the wrongful act the gave rise to the claim took place. Based on the Proposal/Form dated 31.5.1997 and the Plaintiff's letter to the Brokers on 5.6.1997, notice of the potential claim were given to the Brokers on 5.6.1997. Clause 5.1.3 Certificate of Insurance ('COI') for year 1997/1998 and 2001/2002 stipulates that any notice given under Clause 5.1 of the COI is deemed as a claim first made during the Period of Insurance which the notice was given. Under Clause 5.1.2 COI for year 1997/1998 and 2001/2002, notice must be given to the Brokers as soon as the insured becomes aware of facts that could give rise to a claim against him.

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As the Plaintiff notified the Brokers of the potential claim arising out of his conduct for Civil Suit No. 22–26.86 in 1997, the Policy in year 1997/1998 would respond to the Plaintiff's claim.

[28] It is not disputed that the proposal form at p 808 of the record of appeal Part C, Vol 2E was the notification of potential claims pursuant to cl 5.1.2 of the insurance policy dated 5 June 1997 which includes the handling of the GS 1986. The appellant admitted this fact as found at para 42 of the amended statement of claim.

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[29] Clause 5.1.2 says as follows:

Notice shall also be given of any matter event of circumstance of which the Insured shall become aware during the Period of Insurance and which may reasonably be expected to give rise to a claim against the Insured.

G

[30] We agreed with the respondent that pursuant to cl 5.1.3 of the insurance policy, since the appellant has notified the respondent of the GS 2001 pursuant to cl 5.1.2 on 5 June 1997, the 1997 policy would respond for this claim. In other words, the notice given is a claim first made during the period of insurance.

H

[31] Clause 4.1 of the policy also states that the insurers shall indemnify the insured against any claim first made against any or all of them during the period of insurance in respect of any civil liability incurred in the course of the conduct of the profession by the practice.

I

[32] The author WEB Enright in his book *Professional Indemnity Insurance Law* at pp 86–87 says that the core of a 'claim made' policy is that it is a promise

- A by the insurer to the insured that it will indemnify the insured for any claim that is made by a third party that is made against the insured within the duration of the policy, no matter when the defined event affecting the third party occurred.
- B [33] What is meant by the words ‘claim made policy’ in a professional indemnity policy was explained in the English Court of Appeal case (involving a professional indemnity insurance scheme), *HLB Kidsons (a firm) v Lloyd’s Underwriters subscribing to Lloyd’s policy No 621/PK1D00101* [2008] All ER (D) 40 (Nov) Lord Justice Rix’s said:
- C The essence of a ‘claims made’ policy is that it provides cover for a claim first brought against the assured during the policy year. As is common with such policies, however, it extends cover to claim first brought against the assured after the policy year provided such claims arise out of circumstances previously notified to the
- D insurers of which the assured became aware during the policy year. The rationale of such policies has been described in *J Rothschild Assurance plc v Collyear* [1999] Lloyd’s Rep IR 6 at p 22 and in *Friends Provident Life and Pensions Ltd v Sirius International Insurance Corporation* [2005] Lloyd’s Rep IR 135 at p 142.
- E [34] In *Quinn Direct Insurance Ltd v Law Society of England and Wales* [2010] EWCA Civ 805, the English Court of Appeal applied *HLB Kidsons* (also involving a professional indemnity insurance scheme), described the meaning of a ‘claims made’ policy as follows:
- F Both are a type of insurance known as a ‘claims made’ policy, that is to say that the risk insured is that for which a claim is made in the period of insurance whenever the damage or its cause arose as explained by Rix J in *J Rothschild Assurance plc v Collyear* [1999] 1 Lloyd’s Rep IR 6 and Rix LJ in *HLB Kidsons & Ors v Lloyds Underwriters Subscribing to Policy 621/PKID 001001 and others* [2009] 1 Lloyd’s LR 8. Thus, both at the inception of the policy and in the period of its operation, the
- G firm must notify the insurer of relevant circumstances, the extent of which may vary according to the terms of the policy. There is no exception to the obligation of disclosure in the case of information subject to a privilege enjoyed by the firm as opposed to its client (see *March Cabaret Club & Casino Ltd v The London Assurance* [1975] 2 Ll LR 169 at p 177).
- H
- I [35] The correct principle of a claims made policy means, a policy providing coverage that is triggered when a claim is made against the insured during the policy period, regardless of when the wrongful act that gave rise to the claim took place. A retroactive date is applicable to a claims made policy. In such instances, the wrongful act that gave rise to the claim must have taken place on or after the retroactive date. These claims made policy is a type of coverage trigger that obligates an insurer to defend a claim on an insured’s behalf during the period in which the policy is in force. The term ‘made’ means notification to an insured that a demand for money or services is being requested. It is

settled law that a professional indemnity policy with a 'claims made' basis clause, notice of an actual claim by the third party to the plaintiff would then trigger the defendant's liability and put the defendant at risk.

A

[36] The appellant's pleaded that the respondent cannot avoid liability to indemnify the appellant under cl 7.2 because it is not an exclusion clause.

B

[37] Clause 7.2 of the master policy provides as follows:

7.2 BREACH OF CONDITIONS OF THIS INSURANCE

Save in the case of non-payment of the premium but subject to General Conditions 5.3 and 5.10, Insurers will not seek to resile from this contract to avoid any claim on the grounds of breach of non-compliance with the terms and conditions of this insurance.

C

PROVIDED THAT

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1. any person seeking indemnity hereunder shall establish on a balance of probability that the breach or non-compliance was not attributable to 'Misconduct' on his/her part.
2. where the breach on non-compliance has resulted in material prejudice to the investigation and/or defence of any claim the insurer's liability for Damages and Defence Costs may be reduced by the amount of the prejudice sustained.
3. In the event of a difference between the Insured and the Insures regarding the existence of prejudice and/or the cost thereof General Condition 5.9 shall apply.

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[38] Clause 7.2 is clause for breach of conditions of insurance. Exclusion is provided at cl 6 which says that the indemnity in terms of this insurance specifically excludes the events and circumstances mentioned under paras 1–15 of cl 6. One of them is para 5 when any liability directly or indirectly caused by or contributed to by or arising from or in respect of misconduct (save as provided in provision 7.3).

G

[39] The respondent's notices dated 28 March 2014 (see pp 1082–1083 record of appeal Part C, Vol 2F) and 8 April 2014 (see pp 1084–1086 record of appeal Part C, Vol 2F) were issued to the appellant notifying him of breach of the insurance policy. The respondent decline to indemnify the appellant's liability for professional negligence in GS 2001 is premised on breach of conditions of the contract of insurance under cl 7.2 which allows them to resile or avoid any claim on grounds of or non-compliance with the terms and conditions of the insurance subject to proviso to 2 of cl 7.2 where the breach or non-compliance has resulted in material prejudice to the investigation and/or defence of any claim the insurer's liability for damages and defence costs may be

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A reduced by the amount of the prejudiced sustained.

[40] The letter dated 28 March 2014 to the appellant says as follows:

- B 1. We refer to the above matter which came up for case management on 24 February 2014 and 17th March 2014, both of which you were present along with the 1st Plaintiff in this suit i.e. Nirwant Singh a/l Puran Singh ...
- C 2. As you are aware, on 26th November 2012, we obtained an Order dismissing the Plaintiff's claim for want of prosecution ('the Order'). By a Notice of Application dated 30th December 2013, the Plaintiffs have now filed an application to set aside the Order ('the Setting Aside Application'). It is our strategy to oppose the Setting Aside Application. The reason is obvious.
- D 3. By a 'Notis Niat Defendan Ke-3 Untuk Bertindak Sendiri, menggantikan Peguamcara' dated 17 February 2014, you have effectively issued a notice to take over the conduct of the proceeding replacing ourselves as your solicitors. This is a breach of one of the policy conditions as well as our policy strategy. By reason of your actions aforesaid, we are now putting you on notice that the Insurers are reconsidering their coverage in respect
- E of this claim by the Plaintiffs against you.

F [41] Subsequently by the letter dated 4 August 2014, the respondent informed the appellant that by the 'Notis Niat Defendan Ke-3 Untuk Bertindak Sendiri, menggantikan Peguamcara' dated 17 February 2014, the appellant had effectively taken over the conduct of the proceeding and had replaced Messrs Ranjit & Yeoh ('R&Y') as his solicitor in GS 2001 without the respondent's consent. It was also stated that by taking over the conduct of the defence from R&Y without their consent, the appellant had breached the

G policy terms, deprived them of their rights to take conduct of the claim under cl 5.8 and failed cooperate with them. The conduct of the appellant was in conflict, compromised and/or displayed the tendency to compromise and/or prejudiced the appellant's legal position as well as the respondent as the appellant's insurer.

H [42] The appellant did not reply to the respondent's notice or object to such notice or disputed the allegation of breach of or non-compliance of the insurance. In the circumstance, the notice of the breach based on the grounds given were deemed to have been acknowledged and admitted by the appellant.

I In fact, it was not disputed that the appellant had acted on his own as solicitor in GS 2001 replacing the solicitor appointed by the respondent to act for the appellant and the respondent without consent. The respondent's position is also consistent with their pleading at paras 21–22 of the defence and at para 37, stating the particulars of breach of the terms of the 1997 Policy as follows:

- | | | |
|------|--|---|
| 37.1 | The Plaintiff has breached the terms and conditions of the 1997 Policy which entitled the Defendant to decline the claim. | A |
| 37.2 | The Plaintiff has breached the clauses in the 1997 Policy by filing the Notice of Intention to Act in Person without the consent and authority of the Defendant and excluded the Defendant from the conduct of their defence for GS 2001. | B |
| 37.3 | The Plaintiff had conspired with the Plaintiffs in GS 2001 to cheat/deceive the Defendant and GS 2001 is a proceeding to reap profit from the insurance policy by making false and/or fraudulent claim against the Defendant. | C |
| 37.4 | The Plaintiff has materially prejudiced the defence in GS 2001 when the Plaintiff informed the Court and Messrs R& Y that he had no intention to object to Enclosure 183 and consequently, The 2012 Order was set aside and GS 2001 proceeded with full trial. | D |
| 37.5 | The Plaintiff has informed Messrs R& Y that the Plaintiff has intention to admit that he was negligent as alleged by the Plaintiffs in GS 2001.
The Defendant will refer to the terms and conditions of the 1997 Policy, their relevant letters and the Notes of Proceedings for their full terms and effect at the trial of this matter. | E |

[43] The appellant made the claim for indemnity against the respondent in respect of judgment entered against him in GS 2001 by Nirwant Singh. The appellant attempted to prove his claim by tendering a judgment (see at pp 1173–1174 record of appeal Part C, Vol 2G) entered against him on 10 September 2014 and an order for assessment of damages dated 6 February 2015 (see at pp 1183–1184 record of appeal Part C, Vol 2G) and the appellant relied on the said judgment and order in an attempt to prove his claim against the respondent.

[44] The learned JC in his finding of facts found the appellant had taken steps in the court's proceeding as follows:

- | | | |
|-----|--|---|
| (a) | Filing the Notice of Intention to Act in Person; | H |
| (b) | Not objecting to the application to reinstate GS 2001 Suit; | I |
| (c) | The appellant in his cross examination admitted that he took steps to protect his interest and Nirwant Singh's interest in the said Suit (and not to protect the respondent's interest); | |
| (d) | The appellant also admitted that he prepared the Court documents for his brothers who were the Plaintiffs in GS 2001 Suit and gave precedent to Nirwant Singh; | |
| (e) | The appellant purchased the top up insurance for RM10,000,000.00, six (6) months before GS 2001 Suit was filed in Court; | |

- A (f) The appellant admitted liability/contributory negligence in the defence filed in GS 2001 Suit; and
- (g) The appellant did not object to the assessment of damages.

B [45] We agreed with the respondent that the appellant's conduct had prejudiced the appellant's legal position as well as the respondent as the appellant's insurer. We were of the view that the appellant's action falls under the definition of misconduct under cl 3.4 which defined misconduct as any act or omission manifesting dishonesty or substantial lack of good faith. Honesty and good faith is required on the part of the insured when dealing with insurer.

C In all intent and purposes, the insured must not act with fraudulent intent.

[46] Section 17 of the Contracts Act 1950 defines 'Fraud' as follows:

- D 'Fraud' includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract —
- (a) the suggestion, as to a fact, of that which is not true by one who does not believe it to be true;
- E (b) the active concealment of a fact by one having knowledge or belief of the fact;
- (c) a promise made without any intention of performing it;
- (d) *any other act fitted to deceive*; and
- F (e) any such act or omission as the law specially declares to be fraudulent.

[47] Based on the aforesaid, it is our view that cl 7.2 read together with cl 3.4 and cl 5.10 of the policy, gives clear indications that the insurers are entitled to decline policy liability and not to indemnify for making a fraudulent claim.

G Clause 5.10 provides that if any insured shall prefer any claim knowing it to be false or fraudulent as regards amount or otherwise this insurance shall be voidable and such insured shall forfeit the benefit of this insurance as regards such claim.

H [48] It was held in *AXA Affin General Insurance Bhd v ALW Car Workshop Sdn Bhd* [2017] 2 MLJ 101 that if the insured knew that he is making a false claim, then his entire claim is liable to be defeated on the ground of the insured's failure to exercise good faith in his dealing with the insurer.

I In *Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd, The Star Sea* [20-1] *Lloyd's Rep IR 247 (HL)*; [2003] 1 AC 469 (HL), the House of Lords held that an insured owed a continuing duty of good faith to an insurer after the formation of a contract but the duty was limited to not *making a fraudulent claim*.

[30] Consequently, when a claim for indemnity is made under an insurance policy,

the insured is expected to observe the utmost good faith in making the claim. Indeed, it has been held that the duty not to make fraudulent claim and not to make a claim in breach of the duty of utmost good faith is an implied term of the policy (*Smith v Queen Insurance Co* (1868) 12 NBR (1 Han) 311).

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...

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[33] Whether any particular claim is tainted with fraudulent intent is a question of fact to be inferred from the surrounding circumstances. Making a false statement in the belief that it is true constitutes misrepresentation. *However, making a false statement with the knowledge that it is false or not believing it to be true and the intention to deceive amounts to fraudulent misrepresentation.* The test of fraudulent misrepresentation as enunciated by the Privy Council in *Baron Akerhielm v Rolf De Mare* [1959] AC 789 PC is follows:

C

The question was not whether the defendant in any given case honestly believed the representation to be true in the sense assigned to it by the Court on an objective consideration of its truth or falsity, but whether he honestly believed the representation to be true in the sense which he understood it albeit erroneously, when it was made.

D

...

[40] On the totality of the evidence, we do not agree with the findings of the learned JC which is against the weight of the evidence. We have perused the appeal record and are unable to find any evidence to rebut the presumption that the plaintiff is not acting in good faith. On the contrary SP1 admitted under cross-examination that there were a number of vehicles which did not sustain any damage but were nevertheless declared as damaged. Whilst exaggeration in itself is not automatically fraud, *but that in many cases a fraudulent intent can properly be inferred from the presentation of deliberately inflated claim* (*Royal Boskalis Westminster NV and other vv. Mountain and others* [1997] 2 All ER 929; [1997] LRLR 523 at p 593; *Pole v Chapman* [1987] 22 LT 30-6 at p 307; *Transthene Packaging Co Ltd v Royal Insurance (UK) Ltd* [1996] LRLR 32 at p 44; *Superwood Holdings plc, Superwood International Ltd and Superwood (UK) Ltd v Sun Alliance and London Insurance plc trading as Sun Alliance Insurance Group, Prudential Assurance Co Ltd, Church & General Insurance Co Ltd and Raymond P Mc Govern* [1995] 3 IR 303; *Danepoint Ltd v Allied Underwriting Insurance Ltd* [2006] Lloyd's Rep IR 429 at para 56). We are, therefore, constrained to hold that the plaintiff had made a false statement in the claims lists with the knowledge that it is false.

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[41] In the light of our findings, *the entire claim is liable to be defeated on the ground that the plaintiff failed to exercise good faith in its dealings with the defendant. It must follow that since the plaintiff made a total claim knowing it to be a false claim, the plaintiff cannot later recover for a partial loss even if the policy applies to the loss that has happened* (*Dome Mining Corp'n Ltd v Drysdale* (1931) 41 Li L Rep 1009; Carr). Accordingly, it will not avail the plaintiff to argue that its claim on the figure of RM237,451.11 advised by the adjusters should be allowed.

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[49] Further, in *Nsubuga v Commercial Union Assurance Co Plc* [1998] Lexis Citation 3243; [1998] 2 QB 682, which decision was referred by His Lordship

- A Prasad Abraham in the case of *Modern Universal Sdn Bhd v MSIG Insurance (M) Bhd (formerly known as Hong Leong Assurance Bhd)* [2014] 11 MLJ 186, it was held if there is fraud in relation to a claim, then that clause operates not merely in relation to the section of the policy in respect of which the fraud has occurred but to all sections of the policy. Mr Justice Thomas went on further to
- B list down the provisions of the common law relating to the effect of fraudulent claims:

- C There can be little argument about the meaning of general condition 6. A very similar clause was considered by Mance J in *Insurance Corporation of Channel Islands Ltd v McHugh and a Royal Hotel Ltd* [1997] LRLR 94, where Mance J said, at p 135:

- D In my judgment, the *making of a fraudulent claim or use of fraudulent means or devices operates under [the condition in that policy] to forfeit the whole of an insured's benefit under the policy, from whatever date the forfeiture operates, it relates to the whole policy, and not just to any particular section to which the fraud may have related.*

- E I agree with what Mance J says: *if there is fraud in relation to a claim, then that clause operates not merely in relation to the section of the Policy in respect of which the fraud has occurred but to all sections of the policy.*

- F *Apart from the specific terms of the policy, however, there are important provisions of the common law. If I had formed the view that the term had not been incorporated, the common law would have provided a regime between the parties much to the same effect. The position at common law can be summarised as follows:*

- (1) *A person who has made fraudulent claim would not be permitted to recover at all. That principle was set out in the judgment of 'Willes J to which I have already referred, and re-affirmed recently in the decision of the Court of Appeal in Orakpo v Barclays Insurance Services* [1995] LRLR 443.
- (2) *If a claim is fraudulently inflated so that the claim is made in an amount which the plaintiff clearly knows he has not suffered, that will amount to a fraudulent claim and will have the same effect. That seems to me to be established by the decision in Orakpo v Barclays Insurance and in particular in the judgment of Sir Roger Parker at p 452. However, it is important to stress that in connection with this way of putting the claim it is my view that very clear evidence of fraud would be required because one has to accept as a matter of commercial reality that people will often put forward a claim that is more than they believe that they will recover. That is because they expect to engage in some form of 'horse trading' or other negotiation. It would not generally in those circumstances be right to conclude readily that someone had behaved fraudulently merely because he put forward an amount greater than that which he reasonably believed he would recover. He would have to put forward a claim that was so far exaggerated that he knew that in respect of a material part of it, there was no basis whatsoever for the claim.*
- (3) *If a matter that is directly material to the claim advanced is fraudulently*

concealed, then that too can amount to fraud in the making of the claim. That is established by the judgment of Hirst J in *Black King Shipping Corporation and Wayang (Panama) SA v Mark Randal Massie 'The Litsion Pride'* [1985] 1 Lloyd's Rep 437, at pp 512–513, but read in the light of the decision of the Court of Appeal in *The Star Sea* [1997] 1 Lloyd's Rep 361, and in particular the passage at p 371.

Those principles I do not regard as being in dispute.

[50] In *Modern Universal Sdn Bhd v MSIG Insurance (M) Bhd (formerly known as Hong Leong Assurance Bhd)* [2014] 11 MLJ 186. His Lordship Prasad Abraham held as follows:

It is settled law that a contract of insurance is one, *where the parties to the contract are under duty to exercise the utmost good faith in matters relating to the said contract. Consequently, where the party to the contract of insurance acts mala fide then, the innocent party, the defendant in the present case, is entitled in law to be discharged from the obligations under the contract.* In the present case, the plaintiff has made a grossly exaggerated claim which is fraudulent in nature to defraud the defendant. *On the facts and the surrounding circumstances of the present case, the plaintiffs entire claim is liable to be defeated as there has been, inter alia, failure to act in good faith.* As stated a contract of insurance is based upon good faith, and if the utmost good faith is not observed by either party, the contract may be avoided by the other party.

...

[30] *Where a claimant inflates the amount of his claim there is a prima facie presumption that he is not acting in good faith and it is for the claimant to rebut the presumption if he is to succeed in his claim.* In our present case I find the plaintiff has failed to rebut that presumption and therefore the plaintiff was not acting in good faith when making this claim and the claim should be dismissed. It is clear from the cases that in making a claim the insured i.e., the plaintiff must exercise the utmost good faith and must avoid any attempt to exaggerate his claim. If an insured is unsure of his figures he should say so in order to avoid any allegation of fraud. I find as a fact having reviewed the evidence and the documents, there has been exaggeration of the plaintiffs claim in particular reference to invoices (see bundle B at pp 99 214).

[51] His Lordship Prasad Abraham went on to further hold that the insurer can decline liability even due to subsequent fraudulent conduct of the insured ie after commencement of legal proceedings against insured:

[27] Furthermore, in the case of *Baghbadrani v Commercial Union Assurance Co Plc* [2002] Lloyd's Rep IR 94 (Tab 14 of the DBOA); it was decided, inter alia, by Judge Gibbs QC that *an insureds duty to act in good faith continued even after the commencement of legal proceedings against an insured in that the insured was to abstain from making a fraudulent claim.* The plaintiff operated a private Islamic college. The college premises were insured against material damage. The plaintiff was also covered under a business interruption policy for loss of profits. After a fire by unknown persons, the insurers indicated to the insureds solicitors that they were not

- A denying liability under the policy and they duly appointed loss adjusters to negotiate the claim. In the meantime, the insurers appointed solicitors to look into the insureds claim to see if there were grounds for repudiating liability. The solicitors discovered that there were grounds to avoid the material damage policy because fraudulent invoices had been submitted by the insured. Subsequently, the solicitors
- B informed the insured that the insurers were repudiating liability under the business interruption policy on the grounds of fraud. The insured contended that insurers could not raise these defences because they had entered into a binding compromise agreement and that the insurers had also elected to treat the claim as valid and thereby waived any breach of duty by the insured. It was decided by judge Gibbs QC that there was no binding settlement between the parties even if there was such
- C a settlement, it was voidable owing to the fraudulent conduct of the insured, Judge Gibbs QC held in particular at p 122 that:
- For example, fraudulently making a claim or fraudulently misleading the insurer. *The duty to abstain from such fraudulent conduct does in my view survive the commencement of proceedings.*
- D ...
- [29] It is submitted that the effect of the insured submitting or utilising fraudulent devices or documents in support of its insurance claims are far-reaching. In Baghbadrani, (case referred to) the insured only submitted fraudulent documents in
- E relation to the business interruption claim (and not the fire material damage claim) and the fire was found to have been caused by some unknown third party (and not the insured) but the *court eventually dismissed the insureds claim under both policies due to the subsequent fraudulent conduct of the insured.*
- F [52] The appellant relied heavily on the authority of the High Court case *Shan & Gooi (suing as a firm of advocates & solicitors) v Capital Insurance Berhad (10393-D), Willis (Malaysia Sdn Bhd, Malaysia National Insurance Berhad (9557-T), Antah Sedgwick Insurance Brokers Sdn Bhd* [2011] MLJU 440. In the said case, the insurer attempted to avoid liability by claiming that the
- G notification made orally by the insured was a breach of the policy term and alleged that the notification ought to have been in writing. However, the High Court relying on cl 7.2 of the professional indemnity insurance policy, which is *pari materia* with cl 7.2 in the present case, held that mere breaches of the terms and conditions of the policy other than non-payment of premium and
- H subject to cll 5.3 and 5.10, cannot be relied on by the insurer to resile from the contract or avoid liability.
- [53] The learned judge made his decision that the third defendant in that case cannot avoid liability by merely claiming that the oral notification in 1999
- I is a breach of cl 5.2 because oral notification given in 1999 had not caused any prejudice to the third defendant. As stated in the proviso to cl 7.2 it is incumbent on the third defendant to prove by evidence that as a result of the misconduct on the part of the plaintiff material prejudice to the investigation had been occasioned by the oral notification. However, the third defendant did

not adduce any evidence in this regard.

A

[54] Our view is that the above case referred to by the appellant is not relevant because the facts are different. There was no issue of filing notice to act in person in the above case. In the present case, the respondent is not seeking to deny liability based on oral notification, but based on the grounds of breach of or non-compliance with the terms and conditions of the insurance of which proviso 2 to cl 7.2 applies. In this case, the breach or non-compliance has resulted in material prejudice to the defence of the claim.

B

[55] From the evidence led in court it is clear that the appellant has caused material prejudice to the respondent in the conduct of the defence in GS 2001 when the appellant informed the court and Messrs R&Y that he had no intention to object to encl 183 (ie the application to reinstate GS 2001 Suit) and consequently, the 2012 Order (striking out order) was set aside and GS 2011 was reinstated and proceeded with full trial. The appellant further caused material prejudice to the respondent in the conduct of the defence in GS 2001 when he informed Messrs R&Y that he has intention to admit that he was negligent as alleged by the plaintiffs in GS 2001.

C

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[56] The appellant has also caused material prejudice to the respondent when took over conduct of the defence by filing the notice of intention to act in person and supported the application to reinstate GS 2001. As a result of the appellant's conduct, the respondent was denied the rights of handling the defence of GS 2001 in accordance with the respondent's strategy. The appellant's action has resulted in material prejudice to the respondent and therefore the appellant is responsible for any loss he suffered.

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[57] We were also of the view that although there exist a judgment dated 10 September 2014 against the appellant, the appellant has the burden to prove that there was no breach of the terms in the policy that was attributable by misconduct as stated in proviso 1 to cl 7.2 of the insurance policy, which was relied by the appellant in para 29 of the reply to defence. The appellant had failed to establish on a reasonable balance of probability that the breach was not attributable to misconduct on his part.

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[58] We noted that in the appellant's written submission, the appellant admitted that it was an impulsive thing to do. The appellant was in fear of incurring costs towards all his siblings and himself, if both matters were not subjected to retrial, and dismissed. The appellant made mitigation in his submission as follows:

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- A** (a) there was no deliberate attempt by the appellant to mislead the respondent or, conversely, there was no ‘misconduct’ on the part of the appellant vis a vis cl 3.4 of the ‘COI’;
- B** (b) on 31 July 2014, the appellant wrote to the respondent to resend/appoint a solicitor for the respondent, for the retrial. The respondent refused to do so;
- (c) the appellant also sent a notice to the respondent to come for the taxation. The respondent again refused to do so; and
- C** (d) last, but not least, the appellant apologises for filing the notice. It was truly an act of impulse and desperation, at that moment in time (between 6 November 2013–15 May 2014)

D [59] It was clear to us that there is an admission of breach and non-compliance of the insurance policy by the appellant. Be that as it may, the appellant’s mitigation cannot alter the finding of facts by the learned JC based on the evidence before him.

CONCLUSION

E [60] Based on the evidence, we found that the respondent has successfully proven that they have the right to decline policy liability and not to indemnify any false and/or fraudulent claim pursuant to cl 5.10 read together with cl 7.2 of the policy.

F [61] In the result it is our unanimous decision that the appellant’s appeal did not have any merit. We dismissed the appeal with RM5,000 costs subject to court’s allocator fee. Deposit is to be refunded if any.

G *Appeal dismissed with RM5,000 costs subject to allocator fee.*

Reported by Ashok Kumar

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